at issue now is whether he would still be covered by the policy.

The Policy authorised the following persons to drive the vehicle —

(a) The insured.

(b) Any other person who is driving on the Insured's order or with his permission.

Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the motor vehicle.

The appellant was driving the said vehicle with the permission of the policy-holder and the 3rd party policy was in force at the material time. Counsel for the appellant submitted that he was within the category of persons who in the words of the proviso contained in the policy "has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the motor vehicle." I am inclined to agree with him. I have also had the opportunity of seeing a copy of the judgment of Rigby J. in Penang Criminal Revision No. 9 of 1956 which is identical with the present case in which the learned Judge held the driver to be covered by the terms of his 3rd party policy of insurance. With great respect I entirely agree with his views although there is a slight difference in the wording of the proviso in the policy in this case and that in the case before Rigby J. Here the words "is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted" were used instead of "holds a licence to drive or has held". To my mind they conveyed the same meaning.

Two cases of almost similar kind were referred to in Rigby J.'s judgment.

In *Mumford* v. *Hardy*[1] Lord Goddard, C.J., remarked —

"It is one thing for an insurance company to say that the company would not insist on the clause in the Policy that the driver must be a licensed driver, if it were a mere matter of his having forgotten to take out a licence; it is quite another thing if he is disqualified by an order of the Court from driving. At the time when this case came before the Justices the driver had not been disqualified by an order of the Court."

His Lordship referred to the case of *Edwards* v. *Griffiths*[2] where the Court decided that a provision in a Policy providing that a driver must hold a licence, or that he must have held one and must not be disqualified from holding or obtaining a licence, meant disqualified by an order of the Court and in the same case at page 1202 the Lord Chief Justice expressed the view that it would be very much better in all these cases, to take the precaution of having not merely the insurance certificate, but the policy itself, before the Court; that can be done by a subpoena on the assured to produce the policy to the Court. He further stated at page 1203

"I do not say that it is an easy point, but, as it seems to me, as between the assured and the insurers we have to construe the policy against the insurers. If there is an ambiguity or a doubt as to the extent of the Policy, we should have to construe it in favour of the assured, that is to say, if the question arose as to the liability of the insurers, we should have to put on the Policy the construction most favourable to the assured and the less favourable construction to the insurers."

For the above reasons I hold the view that the order of the learned Magistrate should be revised under section 325 of the Criminal Procedure Code. I therefore set aside the conviction and sentence and the order of disqualification against the appellant on the 2nd charge. I further order that the fine of $50 be refunded to him.

Conviction and sentence set aside.

Solicitors: *Lim, Lim & Oon.*

BRAATHENS SOUTH AMERICAN & FAR EAST AIRTRANSPORT A.S. v. THE BORNEO COMPANY LTD.

[C. A. (Rose C.J., Buttrose and Chua JJ.) September 30, 1959]

[Singapore — Civil Appeal No. 21 of 1958]

Carriage of Goods by Air — International carriage — General conditions time limit for notice of non-delivery — Liability of carrier — Warsaw Convention relating to International Carriage by Air, 1929, arts. 23, 26 and 29.

In this case the plaintiffs-respondents delivered to the defendants-appellants a case of watches for carriage by air from Geneva to Singapore. The nature and value of the consignment were not in dispute, nor was the fact that the consignment never reached its destination. It was common ground that the carriage in question was an international carriage within the meaning of the Warsaw Convention relating to International Carriage by Air, 1929 and that the provisions of the Convention applied to the contract. It was also agreed that the contract was made subject to the appellants' general conditions of carriage of goods, so long as such conditions were not inconsistent with the provisions of the Convention.

Article 12(1)(c) and (d) of the appellants' general conditions provide: "(c) in the case of non-arrival or non-delivery, the person entitled to delivery must complain to the carrier not later than 120 days after the date of acceptance of the consignment by the carrier. (d) failing complaints or claim in writing as provided in the foregoing sub-paragraphs, no action shall lie against the carrier, save in the case of fraud on its part." The respondents rely on article 23 of the Convention which provides: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention." Article 26 of the Convention laid down that in the case of delay in the delivery of goods complaint must be made within 14 days from the arrival of the goods; and in the case of damage, within 7 days of the receipt of the goods, and article 29 provided a two-year period of limitation within which any action for damages in respect of a contract of carriage must be instituted.

Held: as the imposition of a time limit of 120 days within which notice of non delivery must be given did tend to relieve the carrier of the liability laid down in the Convention, that provision was a nullity, and therefore the appeal must be dismissed.

Case referred to:—

(1) *Australasian United Steam Navigation Co. Ltd.* v. *Hunt* [1921] 2 A.C. 351.

COURT OF APPEAL.

M. Karthigesu with *Khaw Kai Boh* for the appellants.

J. E. Lloyd for the respondents.

Rose C.J.: On the 31st of March, 1951 the plaintiffs-respondents delivered to the defendants-appellants a case of watches for carriage by air from Geneva to Singapore. The nature and value of the consignment are not in dispute, nor is the fact that the consignment never reached its destination.

It is common ground between the parties that the carriage in question was an international carriage within the meaning of the Convention relating to International Carriage by Air which was signed in Warsaw on the 12th October 1929 and that the provisions of the Convention apply to the present contract. It is, moreover, agreed that the contract was made subject to the appellants' general conditions of carriage of goods, so long as such conditions were not inconsistent with the provisions of the Convention.

In the trial Court the appellants raised a number of grounds on which they contended that their liability was excluded, but upon appeal only a single ground was raised.

Article 12(1)(c) and (d) of the general conditions reads as follows:—

"(c) In case of non-arrival or non-delivery, the person entitled to delivery must complain to the carrier not later than 120 days after the date of acceptance of the consignment by the carrier.

(d) Failing complaint or claim in writing as provided in the foregoing sub-paragraphs, no action shall lie against the carrier, save in the case of fraud on its part."

The respondents concede that no complaint or claim in writing was sent to the appellants within the prescribed time.

Article 23 of the Convention, upon which the respondents rely, reads:—

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

I would observe that there is no provision in the Convention prescribing what notice, or the period of time within which any notice should be given in the event of loss or non-delivery of goods. Article 26 of the Convention lays down that in the case of delay in the delivery of goods complaint must be made within fourteen days from the arrival of the goods; and in the case of damage, within seven days of the receipt of the goods. Article 29 provides a two-year period of limitation within which any action for damages in respect of a contract of carriage must be instituted.

No decided case was cited to us covering this particular point. At page 338 of their book on Air Law Messrs. Shawcross and Beaumont refer to two United States cases in which the Courts declined to strike out defences based on conditions in the contract that claims are not to be maintainable unless notice is given to the carrier within thirty days of the accident. The reports of these cases have not been made available to this Court and it may well be that the matter was purely procedural, from which no inference can be drawn as to the ultimate view that the Court would take of the question posed. It is perhaps of interest to note that the authors go on to say: "It is submitted that the English Courts might hold that such a condition was a 'provision tending to relieve the carrier of liability', and therefore void under Article 23 (in the case of claims for damage or delay to luggage or goods, however, the Act itself requires a 'complaint' to be made within certain specified periods)."

Assistance in the matter may perhaps be considered to be provided by the case of *Australasian United Steam Navigation Company, Limited* v. *Hunt*[1]. Section 4 of Fiji Ordinance XIV, of 1906, which is substantially the same as the Sea-Carriage of Goods Act, 1904, of Australia, provides that where any bill of lading contains any clause whereby the obligation of a shipowner, *inter alia*, to make and keep the ship's refrigerating chambers fit for the carriage and preservation of the goods should in any wise be weakened, lessened, or avoided, that clause shall be illegal and void.

In the case in question bananas were shipped from Fiji under a bill of lading which provided that no claims for loss or damage should be enforceable unless made within seven days from the date at which the cargo was, or should have been, landed. It was held that the clause in the bill of lading above referred to weakened or lessened the shipowner's obligation and was therefore void under section 4 of the Ordinance.

In the matter under consideration does the provision in the general conditions imposing a time limit within which notice of loss or notice of non-delivery should be given tend to relieve the carrier of the liability imposed by the Convention? Were it not for Article 12(1)(c) and (d) of the general conditions, the only obligation upon the plaintiffs-respondents would have been to institute their action for damages within the time limit of two years provided by Article 29 of the Convention. I therefore agree with the conclusion of the learned trial Judge that the imposition of a time limit of 120 days within which notice of non-delivery must be given does tend to relieve the carrier of the liability laid down in the Convention.

That is sufficient to dispose of this appeal which must therefore be dismissed with costs.

Buttrose J. and **Chua J.** concurred.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Drew & Napier.*